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GRAND COURT - CAYMAN ISLANDS

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 40 OF 2006.

BETWEEN:	**PATRICIA MILLER**	**PLAINTIFF**
AND:	**ALDO GIANNE**	**DEFENDANT**

LEGAL DEPARTMENT SEP 25 2006 Cayman Islands

CORAM: **HARRISON J (Ag)**

Appearances:
Mr. Stephen Hall-Jones instructed by Diamond Law Associates for the Plaintiff.
Mr. Alex Horsbrugh-Porter instructed by Ritch and Connolly for the Defendant.

Dates of Hearing: July 26, 28 & September 19, 2006

JUDGMENT

Introduction

1. On the 26th January 2006, the plaintiff filed an action in the Grand Court of the Cayman Islands against the defendant claiming (*inter alia*) damages for breach of warranty and/or for fraudulent misrepresentation in respect of matrimonial property. Both parties are now applying by summons for various orders. The defendant seeks inter alia an order to set aside service of the writ of summons out of the jurisdiction. The plaintiff seeks to add a party to the claim and to amend the statement of claim.

Background to the litigation

2. The parties are American citizens and are residing in the State of California, U.S.A. They were married on June 22, 1985 and eventually divorced in the Superior Court of California, County of Los Angeles on December 6, 2005.

3. In the divorce proceedings they negotiated, agreed and executed a "Stipulated Judgment" on the August 26, 2005 (the Judgment) declaring that they intended to

partition and divide their community assets and liabilities in equal proportion. A warranty clause was also inserted and it states:

> "14.1 – Each party warrants to the other that the warrantor does not own any property of any kind other than the property set forth in this Agreement."

4. Paragraph 18 of the Judgment relates to "After Discovered Property" and states:

> "18.1 In the event that additional assets or a community property or quasi-community property nature are subsequently discovered, the existence of which were in good faith unknown or forgotten by the parties, such assets shall be divided equally between the parties, or otherwise divided as determined by a court of competent jurisdiction. In the event that it is subsequently discovered that either party held community property or quasi-community property or made a transfer or gift of such property contrary to the representations or warranties herein contained, the warrantor shall immediately transfer or pay to the warrantee, at the warrantee's election in his or her sole and unrestricted discretion, one (1) of the following:
>
> > 18.1. One-half (1/2) of the amount of the property, if it is reasonably susceptible to division and is in the warrantor's possession;
> > 18.1.2 One-half (1/2) of the full market value of the property at the time the warrantee discovers the warrantor's ownership of the property or making of the gift; or
> > 18.1.3 One-half (1/2) of the full market value of the property on the date the warrantee receives compensation for his or her interest.
>
> 18.2 The Court shall retain jurisdiction to divide any after-discovered property pursuant to the terms, conditions and provisions of this Judgment.
>
> 18.3 The provisions of this Judgment shall not impair either party's right to seek in a court of competent jurisdiction any other remedy arising out of the aforementioned undisclosed ownership or gift, including the right to punitive damages and attorney's fees and costs.

5. Paragraph 32 of the Judgment speaks to the Reservation of Jurisdiction and states:

   "32. The court specifically reserves jurisdiction over any and all property to be divided pursuant to any provision of this Judgment, and over any and all other executory provisions of this Judgment".

6. At paragraph 34.2 the Judgment states:

   "34.2 The Los Angeles Superior Court shall retain jurisdiction to enforce the terms and conditions of the Judgment as provided herein".

7. The plaintiff further alleged that she has since discovered that the defendant either personally or through Redwood Hotel Investment Corporation in the Cayman Islands had entered into agreements of purchase and sale to purchase residential condominiums at the Ritz Carlton, Grand Cayman which he failed to disclose in the Judgment or in any other declaration of disclosure.

8. The plaintiff also alleged that had the defendant disclosed these assets in the Cayman Islands she would not have entered into the judgment on the terms which she did and would have insisted on an additional payment to her representing half of the value of the undisclosed assets.

9. She has contended that there was breach of warranty and representation by the defendant which was false and fraudulent and as a result she suffered loss and damage.

10. In the circumstances, the plaintiff applied *ex parte* for leave to serve the writ on the defendant out of the jurisdiction. The application was heard by Henderson J. who granted an order in the following terms:

    "(1) The Plaintiff do have leave to serve upon the Defendant by personal service (or any other means of service permitted by Californian law) a copy of the Writ of Summons herein duly sealed with the seal of the Grand Court and accompanied by a prescribed form of acknowledgment of service and the Order made on this application in California, United States of America;
    (2) the time for acknowledgment of service in the action by the Defendant be 28 days after service of the said Writ as aforesaid; and
    (3) the costs of this application be costs in the cause".

11. The following orders were also made on application of the plaintiff: 1. Mareva injunction ordered on the 28th June 2006; 2. Norwich Pharmacal ordered 16th May 2006 and; 3. Order of the 21st June 2006, pursuant to section 4 of the Confidential Relationships (Preservation) Law [1995 Revision].

The defendant's summons

12. The defendant now seeks to set aside the above order and filed a summons on July 13, 2006 seeking the following Orders and/or Declarations:

> "1. An Order that the Writ herein be set aside for want of jurisdiction pursuant to GCR 012, r. 8(1)(a) by reason of a failure on the part of the Plaintiff to comply with applicable principles of the conflicts of laws;
>
> 2. A Declaration pursuant to GCR 012, r. 8(1)(h) that the Writ herein has not been duly served on the Defendant in accordance with the Order of the Court made on 10 March 2006 granting the Plaintiff leave to serve the Writ on the Defendant out of the jurisdiction;
>
> 3. An Order pursuant to GCR 012, r. 8(1)(c) discharging the grant of leave to serve the Writ on the Defendant out of the jurisdiction made on 10 March 2006;
>
> 4. An Order pursuant to GCR 012, r. 8(1)(f) that the Mareva Injunction granted by this Honourable Court against the Defendant on 28 June 2006 be discharged;
>
> 5. A Declaration pursuant to GCR 012, r. 8(1)(g) that in the circumstances of the case the Court has no jurisdiction over the Defendant in respect of the subject matter of the claims herein or the relief or remedy sought in the action;
>
> 6. Declarations pursuant to GCR 012, r. 8(1)(h) that the "Norwich Pharmacal" Order made herein on the 16 May 2006 and the Order made on the 2t June 2006 pursuant to section 4 of the Confidential Relationships (Preservation) Law (1995 Revision) were void and of no effect and an Order that the said Orders be discharged pursuant to GCR 012, r. 8(1)(h);

7. An Order that the costs of this application be paid by the Plaintiff on an indemnity basis; and

8. Such further and other relief as may be appropriate".

13. Order 12 r.8 (1) reads inter alia, as follows:

"8. (1) A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any such irregularity as is mentioned in rule 7 or on any other ground shall give notice of intention to defend the proceedings and shall within the time limited for service of a defence, apply to the Court for -

(a) an order setting aside the writ or service of the writ on him;
(b) ....
(c) the discharge of any order giving leave to serve the writ on him out of the jurisdiction;
(d) ....
(e) ....;
(f) the discharge of any order made to prevent any dealing with any property of the defendant;
(g) a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action; or
(h) such other relief as may be appropriate.

14. The defendant relies inter alia upon the following grounds in support of the summons:

"1. The claim herein is not merely subject to California Law but also asserts breaches and/or misconduct by the Defendant in connection with California Court Orders and /or procedural rules and accordingly is properly to be litigated in California as being the forum conveniens;

2. The Plaintiff commenced litigation in the Los Angeles Supreme Court under Case Number BC 349 094 against the Defendant upon the same grounds and for the same relief and accordingly the Defendant faced litigation on the same matter in two (2) jurisdictions and as a consequence of the Orders and judgments made in those proceedings the bringing of the proceedings in the Cayman Islands is a breach of the Orders of the Los Angeles Supreme Court and the action here should be set aside and/or stayed on the grounds of its alibi pendens;

3. The Plaintiff, having been unsuccessful in an identical claim in California and by bringing an action in the Cayman Islands is "forum shopping" which the rules as to forum conveniens and Iis alibi pendens are designed to prevent;

4. The Plaintiff failed to satisfy the requirements of GCR 011, r. 1 as to the existence of circumstances in which the service of a Writ out of the jurisdiction is permissible;

5 The evidence supporting the application for the Mareva Injunction granted on 28 June 2006 failed to disclose material facts relating to the Californian Court actions and was not a full and frank disclosure of all matters which the Court needed to consider in determining the ex parte application in particular there was material non-disclosure of the Orders and judgments made in the Los Angeles Supreme Court".

15. The defendant also relies upon the affidavit evidence of David E. Fink sworn to on July 12, 2006. He is a partner of the law firm White O"Connor Curry of Los Angeles, California. He deposed that it was his law firm that had represented the defendant and Redwood Hotel Investment Corporation in connection with a lawsuit commenced by the plaintiff in the Los Angeles Superior Court. He further deposed that that suit was a civil action which arose from allegations that in connection with prior divorce proceedings between the parties in the Family Court in California, the defendant had failed to disclose his purported ownership interest in properties in the Cayman Islands. According to Fink, the California lawsuit rested upon the same allegations and claims that the plaintiff has alleged in her Writ and Statement of Claim filed in the Cayman Islands.

16. Fink further deposed:

> "6. In response to the California Lawsuit, we filed a demurrer. In California, a demurrer is a motion to dismiss a pleading, such as a Complaint, on the grounds that the Complaint fails to state a claim upon which relief can be granted as a matter of law (Cal. Civ. Proc. Code § 430.10(e)). A demurrer is used to test the legal sufficiency of the entire complaint or a cause of action alleged therein at an early stage in the proceedings (Cal. Civ. Proc. Code § 430.30(a); Johnson v. County of Los Angeles, 143 Cal. App. 3d 298, 306 (1983); SKF Farms v. Superior Court, 153 Cal. App. 3d 902, 905 (1984)). A demurrer must be sustained where a complaint fails to state facts sufficient to constitute a cause of action (Cal. Civ. Proc. Code § 430.10(e); Schmier v. Supreme Court of California, 78 Cal. App. 4th 703, 707 (2000)). If a demurrer is granted without leave to amend the complaint, the case is over and the moving party is the prevailing party.

> 7. The basis of the demurrer that we filed in connection with the California Lawsuit was that the civil court in the California Lawsuit did not have jurisdiction over the dispute. The Family Court in the Divorce Action had, and continues to have, original, continuing and exclusive jurisdiction over all of the claims that Miller alleged in the California Lawsuit.
>
> 8. The California Family Code governs all disputes regarding alleged community assets that were not disclosed during divorce proceedings. "In a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, *the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding.*" Cal. Fam. Code § 2556 (emphasis added).
>
> 9. Accordingly, under California law, the only court that has jurisdiction to consider Miller's claims as alleged in the California Lawsuit and the Writ and Statement of Claim in the Cayman Islands is the original Family Court that presided over the Divorce Action (In re Marriage of Ump1içy, 218 Cal. App. 3d 647 (1990); Rubenstein v. Rubenstein, 81 Cal. App. 4th 1131 (2000); Neal v. Neal, 90 Cal. App. 4th 22, 25(2001)).

17. The defendant's demurrer was not opposed by the plaintiff. Counsel who appeared on behalf of the plaintiff subsequently filed a dismissal of the California lawsuit so there was no need to proceed with the demurrer.

<u>The plaintiff's summons</u>

18. The plaintiff's summons was filed July 17, 2006. She seeks the following orders:

    "1. That the plaintiff do have leave pursuant to GCR Order 15 Rule 6(2)(b) to add Redwood Hotel Investment Corp. as a party to the action.

    2. That the plaintiff do have leave to amend the writ and statement of claim…

    3. That the plaintiff do have leave to serve the attached mareva injunction on Redwood Hotel Investments Corp.

    4….."

19. The drafted amended statement of claim alleges inter alia:

    (a) That the Plaintiff has since discovered that the <u>First Defendant, as a Director of the Second Defendant</u>, entered into agreements of purchase and sale with

1. Order 11, rule 1(1)(a)(i) (residence)
2. Order 11, rule 1(1)(ff) (claim relates to a company or a Director's relationship with a company); and,
3. Order 11, rule l(l)(h)(an action in relation to a contract affecting land)

26. He argued that the Plaintiff may not now seek to amend the original application by adding other sub-rules in argument or evidence. He said the only evidence adduced by the Plaintiff that Order 11, rule 1(1)(a)(i) applies is contained in the affidavit of Ms. Laura Clemens. He submitted that the information provided to her by Paulette Anglin-Lewis, the then Secretary of the Caymanian Status and Permanent Residency Board, was disclosed in clear contravention of section 9 of the Immigration Law, 2003 and the Court should not admit evidence obtained unlawfully. He argued that the proper course for the Plaintiffs attorneys to have taken, was to have applied for an order of the Court. The Order granting leave under this head of Order 11, rule 1(1) should therefore be discharged on the ground that there was no admissible evidence before the Court to prove an essential element of this subrule.

27. In relation to Order 11 rule 1(1(ff), Mr. Jones submitted that none of the facts pleaded in the statement of claim brings the application within the terms of this subrule. He said that this rule was never designed to apply in the way being proposed by the plaintiff because the subject matter of the claim is an action against the defendant only in his private capacity and not as a director of a company.

28. With respect to Order 11, rule 1(1)(h) Mr. Jones submitted that the plaintiff's claim was not one that was brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction. Her claim as pleaded he said, was one seeking monetary damages for a breach of contract made in California.

29. Mr. Porter, Counsel for the plaintiff, submitted on the other hand, that the claim by the plaintiff is a proprietary tracing claim in relation to immovable assets within the jurisdiction. He argued that the defendant has permanent residency status in the Cayman Islands having regard to the affidavit evidence of Laura Clemens a paralegal in the law firm of Ogier in the Cayman Islands. She had deposed that she received this information from Paulette Anglin-Lewis, Secretary of the Caymanian Status and Permanent Residency Board, after enquiring about the immigration status of the defendant. This information was confirmed by her after she checked the Cayman Islands Government website.

30. Mr. Porter submitted that the document that was revealed was not privileged so the plaintiff would have a right for it to be disclosed. He referred to Halsbury's Laws page 214 – para. 416 and to **ITC Film Distributors v Video Exchange Ltd. and Ors** (1982) 2 All ER 241. The headnote for that case reads as follows:

> "In a copyright action between the plaintiffs and a defendant, certain motions and cross-motions by the respective parties were being heard by the judge in open court on 31 July 1981. After the judge had risen, the defendant obtained by a trick documents belonging to the plaintiffs' solicitors and brought into court by them. When the defendant refused to return the documents the plaintiffs issued a notice of motion on 23 September seeking (i) an injunction restraining the defendant from making copies of the documents, (ii) delivery up forthwith of the documents and any copies of them in the defendant's possession, power, custody or control, and (iii) an injunction restraining the defendant from making use of the documents or copies of them. On 1 October the defendant swore an affidavit in the action to which he exhibited copies of some of the documents and during the hearing of the defendant's cross-motions the judge looked at some of the exhibits to the affidavit and some were also used in cross-examination of a witness. Although the defendant consented to the rest of the relief sought by the plaintiffs in their motion of 23 September, he refused to consent to being deprived of the use, for the purposes of the action, of the copy documents exhibited to his affidavit of 1 October. Accordingly, on 8 October, on the hearing of the plaintiffs' motion of 23 September, the judge ordered that the plaintiffs be granted the relief they sought provided that the

defendant was to be entitled, pending further order, to use the copy documents exhibited to his affidavit for the purposes of the action. By further motion the plaintiffs sought to have the proviso deleted from the order of 8 October. The defendant opposed the motion, contending that the proviso should remain, under the general rule of evidence in civil proceedings that relevant evidence was not to be excluded even though it was obtained improperly or illegally and that if a document was privileged a copy of it might be given in evidence as secondary evidence even though the copy had been improperly obtained.

Held – The public interest in the ascertainment of the truth in litigation, which was the reason for the rule allowing secondary evidence of privileged documents to be adduced even though improperly obtained, was outweighed by the public interest in the proper administration of justice in regard to a litigant being able to bring his documents into court without fear that his opponent would filch them by stealth or a trick. Furthermore, for a party to litigation by stealth or a trick to take possession of documents in court belonging to the other side was probably a contempt of court which the court should not countenance by admitting the documents in evidence in the litigation. Accordingly, the defendant would not be permitted to use in evidence in the action the copy documents exhibited to his affidavit of 1 October, except for those which the judge had already looked at and which had already been used in evidence and could therefore not be excluded (see p 246 *b c* and *h j* and p 247 *b* to *d*, post)".

31. Mr. Porter relied on dicta in the **ITC** case (supra) where Warner J stated:

"In *Lord Ashburton v Pape* [1913] 2 Ch 469 at 473, [1911–13] All ER Rep 708 at 710 Cozens Hardy MR said:

'The rule of evidence as explained in *Calcraft* v. *Guest* ([1898] 1 QB 759, [1895–9] All ER Rep 346) merely amounts to this, that if a litigant wants to prove a particular document which by reason of privilege or some circumstance he cannot furnish by the production of the original, he may produce a copy as secondary evidence although that copy had been obtained by improper means, and even, it may be, by criminal means…"

32. Mr. Porter further submitted that the jurisdiction clauses in the Stipulated Judgment are non-exclusive jurisdiction clauses therefore it was not a breach of the Stipulated Judgment of the 26th August 2005 to have issued proceedings in the

Cayman Islands. He argued that Clause 18.3 specifically provides for "other remedies" in a "Court of a competent jurisdiction " and that it was the clear intent of the Stipulated Judgment that other remedies may be sought in other jurisdictions where appropriate.

33. Mr. Porter also submitted that the main issue in the dispute between the parties is the ownership of immovable property in the Cayman Islands so the Californian court would not be of "competent jurisdiction" to make a finding on the ownership of immovable property in the Cayman Islands. He therefore submitted that proceedings on this issue, is "any other remedy" provided for in the Stipulated Judgment at Clause 18.3.

The conclusions of the Court

34. In an application under GCR 0.12, r.8 by a Defendant to discharge an Order giving leave to serve the Writ out of the jurisdiction made under GCR 0.11 r.1, the burden continues to lie with the Plaintiff to prove that the Order granting leave was properly applied for and granted. The defendant does not bear the burden.

35. Order 11 r.1 defines and sets out the circumstances in which the court may grant leave to serve a writ on the defendant outside of the jurisdiction. The court only has this discretion if the plaintiff can show that the case falls within one of the classes listed in Order 11 and then only if the plaintiff can show that he has a good arguable case and that the case is a proper one for service abroad (see Order 11 r4(2). Of course, this requires the plaintiff to show that the Grand Court of the Cayman Islands is the appropriate forum to hear the action.

36. Order 11 r 1(1) reads inter alia:

"Rule 1(1) - Provided that the writ does not contain any claim mentioned in Order 75, rule 1(3)
service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ -
(a) relief is sought against a person who -
(i) has the right to reside permanently in the Islands; or

(ii) has a right to work in the Islands; or
(iii) is resident in and the nature and circumstances of his residence indicate that he has a substantial connection with the Islands;

(b)...
(c)...
(d)...
(e)...
(f)...
(ff) the claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction or who was a partner of a partnership, whether general or limited, which is governed by the laws of the Islands and the subject matter of the claim relates in any way to such company or partnership or to the status, rights or duties of such director, officer, member or partner in relation thereto;
(g)...
(h) the claim is brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction;
(i)...
(j)...
(k)...
(l)...
(m)..."

37. The implications of Order 11, rule 4(2), are threefold. Firstly, it denies the court jurisdiction to grant leave to serve a writ or notice of a writ extra-territorially where there is no prescribed jurisdictional ground therefor available to the plaintiff. Secondly, it requires the plaintiff to establish a good arguable case (as distinct from a mere prima facie case) that the circumstances of the action constitute one of the jurisdictional grounds prescribed for extra-territorial service. Thirdly, even where a prescribed jurisdictional ground is established, the court (in the exercise of its discretion) may refuse leave if the plaintiff has failed to establish a good arguable case that the case is a proper one for extra-territorial service. For example, a case will be held not to be such a proper case where the local court is not the *forum conveniens* or the most appropriate *forum* for the trial of the action in the interests of all parties and the ends of justice.

38. Accordingly, there are invariably two pertinent issues involved in an application for leave to serve a writ extra-territorially. The first issue is the jurisdictional issue as to whether one of the prescribed jurisdictional grounds for extra-territorial service is available to the plaintiff. The second issue is the discretionary issue as to whether the case is a proper one for such service. Leave will be deemed to have been properly granted if both issues were decided in the plaintiff's favour.

39. Analogously, the same two issues must be involved in an application to set aside an order granting leave to serve a writ extra-territorially or to set aside the extra-territorial service of a writ. The application will be granted only if one of those two issues is resolved in the defendant's favour. Accordingly, one of the questions in this case is whether Henderson J adjudicated either of these two relevant issues when he made the order for service of the writ outside of the jurisdiction.

40. The application for service outside of the jurisdiction was made by exparte summons dated March 17, 2006 and the order was granted on March 20, 2006. The summons was supported by the respective affidavits of the plaintiff sworn to on March 17, 2006 and Laura Clemens sworn also on March 17, 2006.

41. Looking at the Writ and Statement of Claim in its original form it will be seen that on the day of the exparte application it was evidence of Laura Clemens and the allegations in the statement of claim which were relied on that the defendant was permanently residing in the Cayman Islands. There was no evidence of the defendant being a Director of Redwood. In any event Redwood was not a party to the action at the time of the application.

42. In my judgment, the evidence of Laura Clemens relating to the defendant's permanent residency in the Cayman Islands was apparently obtained by improper means but it could nevertheless be utilized by the court. It is the public interest in

the ascertainment of truth which is paramount. In the circumstances, Henderson J was correct in not rejecting this evidence.

43. The record does disclose that one of the jurisdictional grounds, that is permanent residence within the Cayman Islands, was available to the plaintiff and was therefore a proper case for extra-territorial service.

44. The remaining question is whether the presumed regularity of the order and the extra-territorial service is affected by well established principles of law.

45. Having perused the affidavit evidence in addition to the documents exhibited in the instant matter, I am of the view that the plaintiff's affidavit in support of the application for leave to serve the writ out of the jurisdiction, failed to inform the Court of the following facts which in my view amount to non-disclosure of relevant material:

    1. The plaintiff having issued the writ of summons on January 26, 2006 she had also filed proceedings containing almost identical claims in the Los Angeles Supreme Court against the Defendant under Case No. BC 390094. These proceedings were filed on the 17th March 2006 —the same day that the Plaintiff swore her affidavit in support of the application under Order 11 r 1(1). She therefore failed to inform the Grand Court of a lis alibi pendens in another jurisdiction.

    2. There was a Stipulated Judgment of the Family Court in California which contained a clause that the Family Court had "... original, continuing and exclusive jurisdiction..." over all of the claims alleged by the Plaintiff in the Los Angeles Superior Court proceedings. In my judgment, the plaintiff owed a duty to the Grand Court to disclose these facts which could have had a significant bearing on the outcome of the application before Henderson J. if he had been aware of them.

46. There is also the issue of non-disclosure of material facts relating to the grant of an order for mareva injunction. In my view, the court ought to have been

informed on the 28th June 2006 when the Grand Court ordered the mareva injunction that the plaintiff's claims in the Los Angeles Superior Court were dismissed on demurrer on the 5th June 2006. The indisputable inference to be drawn from this dismissal is that the Superior Court recognized "the "continuing and exclusive jurisdiction" of the Family Court". A supplemental affidavit ought to have been filed informing the Court of the order made by the Los Angeles Superior Court.

47. I turn my attention now to the issue of forum conveniens. Notwithstanding that the plaintiff can show that his or her action falls within the various grounds listed above, in Order 11, the Court will not grant leave to serve a writ outside of the jurisdiction unless it is satisfied that the Cayman Court is the most appropriate one for the trial of the action in the interests of the parties and the furtherance of justice.

48. The essential feature of the rule against forum shopping and the application of the principle of forum conveniens is to avoid multiplicity of proceedings and the obtaining of inconsistent judgments by reason of the application of different rules of substantive and adjectival law.

49. In the leading case of **Spiliada Maritime Corp. v Cansulex Ltd** [1987j AC 460 the House of Lords gave some guidance as to the factors which the Court might consider in deciding the forum in which the case could most suitably be tried. The **Spiliada** case decided inter alia, that the following factors may play a part in the discretion of the court: the nationality of the parties, the nature of the dispute, any applicable law of the contract or practical difficulties in holding the trial in a specific forum including, the location of witnesses, the nature and location of evidence likely to be adduced and expense. Of course, these factors are not exclusive.

50. The principles derived from the **Spiliada** case have been incorporated into Caymanian jurisprudence in the following cases:

    1. **Lhasa Investments Ltd and Concorde International Trading SA v International Credit and Investment Co (Overseas) Ltd** (in Liquidation) [1994-1995] CILR 293 CA

    2. **Insurco International v Gowan Co** [1994-51 CILR 210 CA;

    3. **Connelly v South Pointe Capital Corporation** [1998] CILR 243;

    4. **Contadora Enterprises SA v Chile Holdings Cayman,) Ltd**[1999] CIL.R 194 CA;

    5. **Hutchinson Ltd v Cititrust** [1998] CILR 43.

51. The plaintiff's claim is based on an action for damages in personam. There is no allegation of a tracing claim in relation to assets. In my judgment, even if the amendments sought by the plaintiff were to be granted this would not help the plaintiff. The prayer in the claim is really concerned with a claim for money and not one for tracing.

52. The facts of this case reveal that both the Plaintiff and the Defendant are domiciled and resident in California, and that this is essentially a matrimonial property issue. The Family Court in California has the power to make orders binding on the Defendant regarding disclosure and assets.

53. The Plaintiff should therefore be held to her election contained in the Stipulated Judgment. Having agreed in that Judgment that California would have exclusive and ongoing jurisdiction, I hold that she should not now be permitted to argue that the courts of the Cayman Islands should have jurisdiction to entertain her claim. She should be required as a matter of Californian law to prove her claim in the Family Court. See the Californian cases of **Rubenstein v. Rubenstein** 81 Cal. App. 4th 1131 (2000); **Neal v. Neal**, 90 Cal. App. 4th 22, 25(2001)).

54. In **Rubenstein** case, a former wife brought an action in civil court seeking relief from a dissolution judgment on the basis of fraud and perjury by her former husband in allegedly concealing his ownership interest in certain music rights. The former wife also sought damages on various tort theories including fraud, intentional nondisclosure—concealment, breach of fiduciary duty, and conversion. The California Court of Appeal held that the Family Code governed the entirety of the action stating, "*[although [wife] has alleged numerous causes of action herein, this action is nothing other than an attack on the judgment in the marital dissolution proceeding on the grounds of fraud and perjury.*". The court went on to conclude that the Family Code, "*governs this matter in its entirety, irrespective of the various legal theories [wife] has pled in her complaint.*" Further, the court stated that "*no tort action lies for concealment of community assets in a dissolution proceeding.*" (emphasis supplied)

55. I hold that the Family Court of California is the forum conveniens or the most appropriate forum for the adjudication of this matter in the interests of all the parties and in the ends of justice.

56. For these reasons, the defendant's application succeeds in terms of paragraphs 1, 3, 4, and 5 in the summons. The plaintiff's summons is therefore dismissed. There shall be costs to the defendant to be taxed if not agreed.

Hon. Justice K. Harrison
Acting Judge of the Grand Court